



AF IW

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First Named  
Inventor : Jeffrey Duane Vance et al.

Appln. No.: 10/075,180

Filed : February 13, 2002

For : POLYMERIC MATERIAL WITH  
RESISTANT STRUCTURE AND  
METHOD

Docket No.: H49.12-0003

Group Art Unit: 1772

Examiner: S.M. Nolan

REPLY BRIEF TO EXAMINER'S ANSWER

Mail Stop Appeal Brief-Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

I HEREBY CERTIFY THAT THIS PAPER IS BEING  
SENT BY U.S. MAIL, FIRST CLASS, TO THE  
COMMISSIONER FOR PATENTS, P.O. BOX 1450,  
ALEXANDRIA, VA 22313-1450, THIS

11 DAY OF April, 2005

*Deuche Zkvale*  
PATENT ATTORNEY

Sir:

This reply is in response to the Examiner's Answer mailed  
February 10, 2005.

I. Applicant Objects to the Examiner's Answer as follows

A. Applicants' Brief contains a statement identifying  
Related Appeals and Interferences

On page 1, ¶ 3 of the Examiner's Answer, it states that  
Applicants' "brief does not contain a statement identifying the  
related appeals and interferences which will directly affect or be  
directly affected by or have a bearing on the decision in the  
pending appeal". On Page 1, under the heading "RELATED APPEALS  
AND INTERFERENCES", Applicants' Brief states "[t]here are no known  
related appeals or interferences which will directly affect or be  
directly affected by or have a bearing on the Board's decision in  
this appeal." **Correction of the Examiner's Answer is respectfully  
requested.**

B. The Status of the Claims in the Examiner's Answer is Incorrect:

The Examiner's Answer states that "[no] claim has been allowed" but that claims 6 and 10 are objected to as being dependent upon a rejected base claim but allowable if rewritten in independent form to overcome all of the limitations of the base claim and any intervening claim. Claim 10 is an independent claim and is NOT dependent upon a rejected base claim and accordingly allowance thereof is respectfully requested.

In Section (3) of the Examiner's Answer it states that "claims 15-19 have been withdrawn from consideration as not directed to the elected invention." Applicant notes that in fact, claims 15-29 are withdrawn. Correction of the withdrawn claim status in the Examiner's Answer is respectfully requested.

**II. Rejection of claim 3 under 35 U.S.C. § 112 is contrary to Established Legal Authority.**

Claim 3 was rejected on the basis that the recitation of an elastomeric or polymer material is indefinite. The metes and bounds of a claim are not rendered unclear merely because of the presence of alternative language in a claim. For example in *In re Gaubert*, the Court of Customs and Patent Appeals held that the phrase "iron, steel or any other magnetic material" was definite and accurately defined the metes and bounds of protection. *In Re Gaubert*, 187 U.S.P.Q. 664 (CCPA 1975).

In the present case "or" refers to alternatives which are fully supported by Applicants' specification and clearly define the metes and bounds of Applicants' invention. The Examiner cites no rationale or basis to support that elastomer in claim 3 means "not polymer" and that polymer in claim 3 means "not elastomer" as set forth in the Examiner's arguments. This is contrary to the ordinary meaning of the word "or" as acknowledged by the Examiner. Allowance of claim 3 under 35 U.S.C. § 112 in view of the cited

legal authority is respectfully requested.

**III. Applicants do not have a burden to demonstrate that objects of the references are different to Render their Teachings Uncombinable.**

It is insufficient to establish obviousness on the basis that the separate elements of the invention existed in the prior art, absent some teaching or suggestion in the prior art to combine the references. *Arkie Lure, Inc. v Gene Larew Tackle, Inc.* 43 U.S.P.Q.2d 1294 (Fed. Cir. 1997).

Analogous references are not properly combinable absent a motivation or suggestion to combine the references. The suggestion to combine the references may come expressly from the references, from knowledge of those skilled in the art that certain references, or disclosure in the references are known to be of special interest or importance or from the nature of the problem to be solved.

On page 10, ¶5 of the Examiner's Answer, it states that Applicants **"have not convincingly argued or demonstrated that the differences in the "object(s)" of the Widder and Gould references renders their teachings uncombinable"**. Applicants do not have a burden to demonstrate that objects of the references are different and thus uncombinable. To support a rejection under 35 U.S.C. § 103, the Examiner must provide a motivation or suggestion to combine the references. Differences in objectives of the references tend to negate a motivation or suggestion to combine references.

IV. The Examiner's Rejection does not provide a proper motivation to combine the references to reject claims 13-14 as follows.

A. The Examiner's Answer misinterprets the references.

In the Office Action, it states that

"the provisions of pockets - per the teachings of . . . Gould . . . - means that the elements/platelets . . . can be removed so that the supportive garment can be cleaned/handled in any way the consumer desires. (Examiner's Answer, Page 10, ¶ 4). This is not correct. The platelets of Gould are embedded in an elastomeric layer. The material of Gould is formed by dipping a mold in a container having a supply of platelets held in suspension in a liquid elastomer. Inner and/or outer layers 30 are formed by dipping the mold in a container having the elastomer 30 prior to and/or after the platelet containing material is dip coated thereon to form a laminated structure. (Col. 9, line 51 - 10, line 8). The platelets of Gould are embedded in a molded structure and are not removable, and rejection of the claims 13-14 on the basis that the platelets are removable is clearly erroneous.

B. The Examiner's Combination of References requires Substantial Reconstruction.

The suggestion to combine references must NOT require substantial reconstruction or redesign of the references to arrive at the claimed invention. In Widder, the bulletproof elements or plates can be "removably stored in pocket elements. To clean the system, the bulletproof elements are simply removed from the pockets". (Col. 2, lines 60-65). Gould relates to a laminated structure with embedded platelets. Rejection of the claims on the basis that "Gould teaches use of pockets for their elements/platelets" would take substantial reconstruction to form a pocket element to removably hold the bulletproof plates of

Widder.

C. Widder teaches away from the motivation asserted by the Examiner.

In the Examiner's Office Action and Examiner's Answer, it states that it would be obvious to combine the epoxy platelets and composite structure of Fortier and Gould with Widder on the basis that Fortier and Gould teach a composite or structure that permits movement or is allowed to stretch or flex.

Widder, however teaches against this recited motivation. Widder teaches a body protection system including a bulletproof plates held in pocket elements. The bulletproof plates are formed of a heavy bulletproof metal, Kevlar or the like and thus there is no motivation to modify the bulletproof plates of Widder in view of Gould and Fortier to provide a flexible structure instead of heavy bullet proof metal plates taught in the reference. Where the references teaches a rigid structure, the Examiner cannot rely on Applicants' own teaching to provide a motivation to modify the references to provide a flexible material.

D. The combination does not teach each of the recited claim limitations.

The combination must teach each of the claim limitations or elements. The combination of the puncture and cut resistant composite material of Gould and/or protective web of Fortier in the pocket element 72 of Widder does not teach each of the recited claim limitations. In the present application, modification of the bulletproof plate of Widder in view of Gould provides the puncture and cut resistant material of Gould in the pocket element (e.g. 72) of Widder. This does not teach the interspatial pocket formed of opposed flexible layers of an elastomeric or polymer

film or material having a penetration resistant material floatably disposed therein as claimed.

**V. Rejection of claims 1, 4-5, 7-9, 11-12 and 30-36 based upon hindsight is improper.**

Claim 1, 4-5, 7-9, 11-12 and 30-36 were rejected on the basis that it would have been obvious to modify the bulletproof plates of Widder in view of Gould and Fortier on the basis that Gould and Fortier permit movement or flex.

As previously discussed, Widder teaches against the recited motivation. Widder teaches bulletproof plates formed of a heavy bulletproof metal, Kevlar or the like. (Col. 4, lines 33-35). The heavy metal plates taught by Widder are not rigid and thus there is no motivation to modify the plates of Widder in view of Gould and Fortier to provide a flexible structure instead of the heavy bulletproof metal plates in the reference. Where the references teaches a rigid structure, the Examiner cannot rely on Applicants' own teaching to provide the motivation to modify the references as set forth in the Examiner's Answer.

Furthermore, claim 30 recites that the opposed flexible layers are laminated to form the seam and was rejected as a matter of engineering choice. In Widder, edges are sewn shut. (Col. 5, lines 34-37). Reference to engineering choice does not provide a basis or motivation to modify the reference and thus, the Examiner has failed to set forth a prima facie basis to reject claim 30.

**VI. The Combination of References does not teach the subject matter of claims 32.**

In claim 32, the resistant infrastructure formed in the interspatial pocket includes a substrate floatably disposed in the pocket including an array of plates formed on the substrate floatably disposed in the pocket. Rejection of claim 32 on the basis that the platelets of Gould disposed in encapsulating pockets move fails to consider that claim 32 recites a substrate

including an array of plates where the substrate including the array of plates is floatable disposed in an interspatial pocket. Array refers to more than one. In Gould, a substrate layer including an array of platelets is not floatably disposed in an interspatial pocket. On the contrary, the layer with the embedded platelets is adhered to outer layers 30 and is not floatably disposed relative to the outer layers 30. Thus, the Examiner has failed to establish a *prima facie* basis to reject claim 32.

**VI. Rejection of claim 33 fails to consider each of the recited claim limitations.**

Claim 33 was rejected on the basis that "Gould teaches the lamination of two platelet-containing structures" (Examiner's Answer, page 13) without consideration of each of the recited claim elements. Claim 33 recites a first infrastructure including an array of penetration resistant plates and a second infrastructure including an array of penetration resistant plates. The first infrastructure is disposed in an **interspatial pocket formed between the first opposed flexible layers**. The second infrastructure is disposed in an interspatial pocket formed between **second opposed flexible layers**. Thus rejection of claim 33 on the basis of "lamination of two platelet-containing structures" as set forth in the Examiner's Answer is clearly erroneous since it fails to consider the first and second opposed flexible layers where each of the first and second opposed flexible layers forms an interspatial pocket in addition to each of the first and second infrastructures disposed in the respective interspatial pockets.

**VI. Rejection of claim 35 on the basis of "conventional engineering skill" is not sufficient to establish obviousness.**

Claim 35 recites an array of penetration resistant plates formed on a mesh substrate to form a wire mesh portion. Claim 35 was rejected on the basis that "one having ordinary

skill in the art would apply conventional engineering skill to reinforce Fortier's web with wire and employ the resultant wire-reinforced web". In Fortier, platelets are formed on fabric, such as a woven, knitted or non-woven textile, synthetic or polypropylene material and rigid platelets made of polymeric thermoplastic or thermosetting material are secured to the fabric.

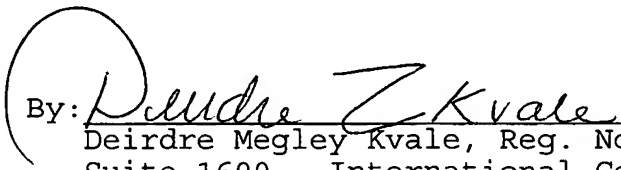
The Examiner's rejection does not state a motivation or suggestion to modify Fortier, other than using the hindsight of Applicants' specification. Failure to provide a motivation or suggestion to modify the reference is presumptive evidence that the Examiner's obviousness rejection is based upon hindsight. Based upon the foregoing, withdrawal of the rejection of claim 35 is respectfully requested.

Based upon the foregoing, Applicant respectfully requests allowance of claims 9-11 and 21-23.

The Director is authorized to charge any fee deficiency required by this paper or credit any overpayment to Deposit Account No. 23-1123.

Respectfully submitted,

WESTMAN, CHAMPLIN & KELLY, P.A.

By:   
Deirdre Megley Kvale, Reg. No. 35,612  
Suite 1600 - International Centre  
900 Second Avenue South  
Minneapolis, Minnesota 55402-3319  
Phone: (612) 334-3222 Fax: (612) 334-3312

DMK:bjt